In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

ROYAL INSURANCE COMPANY, LTD. (a Corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The insurance contract in suit covers on respondent's "leasehold interest", and is expressly predicated upon a "lease to land".

The house had been built by one Keil about 1890 (SR 118), on beach property then owned by Belvedere Land Company (SR 117). In 1896 the Land Company deeded the beach property to the newly incorporated town of Belvedere in trust for perpetual use

as a public beach; the deed (SR 17)[1] provides that the Keil house shall not "be renewed in case of destruction by fire or otherwise", and that it shall be permitted to remain on the beach property "as long, and subject to such conditions as shall be determined by said town".

In 1910 Keil deeded the house to his sister-in-law, Mrs. Bland (SR 120, 150-1); she died in 1926, and title passed to Crocker First Federal Trust Company as executor and testamentary trustee (SR 158). The Trust Company sold the house in 1928 to respondent (SR 121-2, 212), who occupied it until its destruction by fire in 1932. From 1893 (SR 125) until the fire, respondent and each of his predecessors in interest paid three dollars monthly "ground rent" for the use of the land on which the house stood.

Respondent paid the Trust Company $6000 for the house and "whatever right" of occupancy existed (SR 275-6). He made extensive physical improvements, and when the house burned in 1932 it had a value of $17,985.[2]

In respondent's original complaint herein it is alleged that his "leasehold interest" arose from the provisions of the 1896 deed by which the town acquired the property. Judgment at the first trial for respondent was reversed on appeal (77 F2 157) on the

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[1]The deed is analyzed in the first opinion of the Circuit Court of Appeals herein, 77 F2 157.

[2]This amount, as well as the full value of the contents of the house, was covered by fire insurance policies written by petitioner and other insurers, and was paid to respondent by them (SR 265).

ground that the complaint did not state a cause of action, since "no interest subsisted in plaintiff by the terms of the deed alone" (p. 159).

Respondent then amended to allege a different basis for his "leasehold interest". He alleged[3] that the Belvedere Land Company, before deeding the property to the town, entered into a written agreement with Keil—

> "to allow him, as its lessee, to maintain the improvements upon the real property in consideration of the payment of $3 per month . . ., Keil to have the exclusive possession and use of the ground until such time as the improvements should be destroyed by fire, or otherwise."
> (93 F2, 144.)

The town, it was alleged, took with knowledge of Keil's lease, and its title was subject thereto; and Keil's leasehold rights passed, successively, from Keil to Bland to Bland's estate to respondent.

The complaint also alleged that when respondent applied to petitioner for a policy insuring against the loss of his tenure, he "fully advised" petitioner of all the pleaded facts concerning this lease.

The Court of Appeals held that this complaint stated a cause of action, and that respondent was "entitled to an opportunity to make his proof" (93 F2, 146).

At the second trial respondent was wholly unable to prove the existence of the pleaded (or any) lease for a term commensurate with the life of his building. The

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[3]These allegations are summarized in the second opinion of the Court of Appeals, 93 F2 143, 144.

District Court gave judgment for petitioner (SR 60, 93).

On appeal the judgment was reversed. The Court of Appeals pointed out that the evidence established the existence of a month-to-month tenancy in respondent (SR 372), and held that this was a "lease" and "leasehold interest" within the meaning of those terms in the policy (SR 373). It was recognized in the opinion that this month-to-month tenancy was not the pleaded leasehold interest "for a term running at all events until the destruction of his buildings" (SR 374), and respondent was given leave "to amend his complaint in conformity with his proof" of a month-to-month tenancy.

Respondent then filed his fourth amended complaint (R 1), in which he shifted to still a third basis on which to rest his "leasehold interest". In this pleading all pretense that respondent had more than a month-to-month tenancy is abandoned, and all allegations relating to a lease between Keil and the town's grantor are omitted.

Petitioner's answer (R 13) pleads, by way of affirmative defense, that respondent procured the policy in suit by falsely representing to petitioner that he held a lease to the beach property for a term running to, and not expiring until, the destruction of his building (R 59-62).

It was stipulated (R 58) that the entire record of the second trial[4] was to be deemed in evidence as a part of the record of the third trial.

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[4]Supplemental Transcript of Record herein.

The trial Court (R 25) gave judgment (R 41) for petitioner, on findings (R 31) sustaining the affirmative defenses of misrepresentation, mutual assumption proving false, and rescission.

These findings of fact were rejected by the Court of Appeals, which reversed the judgment and ordered the District Court to enter final judgment for respondent (R 232, 237; 125 F2 222). Petition for rehearing was denied (R 239).

ERRORS TO BE URGED.

1. The Court of Appeals erred in construing the words "lease" and "leasehold" in the policy to comprehend a month-to-month tenancy.

2. The Court of Appeals exceeded limitations of appellate review prescribed by Rule 52(a), FRCP, in rejecting *in toto* the trial Court's findings of fact on the affirmative defenses, reversing judgment for petitioner, and ordering that final judgment be entered for respondent on the strength of its own (implied) contrary factual findings.

ARGUMENT.

I.

MEANING OF "LEASE" AND "LEASEHOLD INTEREST".

SUMMARY: A MONTH-TO-MONTH TENANCY IS NOT A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE TERMS IN THE CONTRACT OF INSURANCE. THE COURT OF APPEALS ERRED IN APPLYING TO THESE TERMS A TECHNICAL DEFINITION FROM THE LAW OF LANDLORD AND TENANT, AND REJECTING THE PLAIN MEANING ACCEPTED BY ORDINARY USAGE.

1. Standard of interpretation.

Insurance contracts, like other contracts, are to be interpreted according to the ordinary and popular sense of the words used, rather than according to their strict legal meaning.

California Civil Code, Section 1644;

Bastian v. British Amer. Assur. Co., 143 Cal. 287, 77 P 63;

Aschenbrenner v. United States Fidelity & G. Co., 292 US 80, 54 SCt 590, 78 LEd 1137;

1 *Restatement of Contracts* 319, Section 235(a).

2. Authorities relied on by Court of Appeals.

The opinion of the Court of Appeals adopts a strictly technical definition of the words "lease" and "leasehold", taken from the law of landlord and tenant.[5] This definition, according to the quotations found in the opinion (SR 373), embraces a tenancy from month-to-month and a tenancy at will.

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[5]This refers to the third opinion of the Court of Appeals (SR 366, 373-4); it established this construction of the policy as the law of the case, so that it was no longer an open question on the last trial or appeal.

It is undisputed that the holding was purely a matter of definition, as the record is wholly devoid of any intimation that the parties used the words in any special sense. The only tenure discussed by the parties was one for a term not expiring until the building was destroyed. Certainly, there was no mention of a month-to-month tenancy.

Without exception, each of the cases quoted from or cited in the opinion (SR 373-4) involved a written lease specifying a fixed term of occupancy.

The first quotation (SR 373) is from *Bouvier,* as quoted in *Walls v. Preston,* 25 Cal. 59. But, *Bouvier's Law Dictionary* (Rawle's 3d Rev.) defines "leasehold" as follows:

> "The estate held by virtue of a lease. *In practice the word is generally applied to an estate for a fixed term of years.*"

The second quotation (SR 373) is from *Ruling Case Law,* as quoted in *Stone v. Los Angeles,* 114 Cal. App. 192, 299 P 838. But, in the very same section of that work (16 RCL 531) the text continues:

> ". . . *As ordinarily employed,* the word lease implies a term . . . The term *'tenant'* is, however, sometimes used in a *broader sense* so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years or at will.' "

3. **Correct meaning of the policy.**

The words "lease" and "leasehold" are common to ordinary usage in the daily affairs of mankind. They

have acquired a fixed and definite meaning,—an accepted significance.[6]

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159, 167:

> "Undoubtedly the word 'lease', *as ordinarily interpreted and understood,* . . . denotes the creation of an estate for years commonly called a term."

Mayberry v. Johnson, 15 N. J. L. 116, 121:

> ". . . *In common parlance,* where it is said a man has a lease for property, nothing more is meant, than that he has a term, or an estate for years in the premises . . ."

See also, *Koehler v. Dennison* (Ore.) 143 P 649, where the Court definitely rejected the contention that a month-to-month tenancy was a lease within the ordinary usage of that term.

Raynolds v. Hanna (C.C., N.D. Ohio, E.D.) 55 F 783, 800:

> "In the present case the term (of the lease) is sufficiently definite . . . It is to continue so long as there is coal that can be 'practicably mined'. This constitutes a 'determinate period'."[7]

Abbott's Law Dictionary:

> "Leasehold. Any interest in land less than freehold *might* be so called; *but, in practice, the*

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[6]The meaning of English words and phrases is within the judicial knowledge of the Court.

Nix v. Hedden, 149 US 304, 13 SCt 881, 37 LEd 745.

[7]This is precisely the kind of lease that the parties had in contemplation in the case at bar.

word is generally applied to an estate for a fixed term of years."

Anderson's Law Dictionary:

"Leasehold. An estate in land *for a fixed term of years."*

Byrne's Law Dictionary:

"Lease. A lease is in effect a conveyance or grant of the possession of property (generally but not necessarily land or buildings) to last during the life of a person, or for a term of years or other fixed period, or at will, and usually with the reservation of a rent. Leases for a life or lives are comparatively rare, *and when a lease is spoken of, prima facie a lease for years is meant.*

Leaseholds are lands held under a lease for years."

Murray's New English Dictionary:

"Lease. 1. A contract between parties, by which the one conveys lands or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensation. . . .

The grantor of a lease is called the lessor, and the grantee, the lessee. *In popular language, lease is usually confined to a conveyance by deed for a term of years."*

Funk & Wagnall's New Standard Dictionary:

"Lease. 1. A contract for the possession and profits of lands *for a determinate period,* less than the time for which the lessor holds the same, in consideration of a recompense of rent . . .

Leasehold. An interest in lands held as a dependent tenure by virtue of a lease *for a term.*"

March's Thesaurus Dictionary:

"Lease. A contract for the possession and profits of lands, etc., *for a determinate period;* the document for this."

Oxford Dictionary:

"Lease. a. A contract between parties, by which the one conveys land or tenements to the other for life, for years, or at will . . . *In popular language* lease is usually confined to a conveyance by deed for a term of years."

New International Encyclopedia (2d Ed.), vol. XIII, pp. 678-9:

"Lease. The act or instrument whereby any estate in land less than a fee is created. In its most extended sense the term thus includes the conveyance of a life estate as well as the agreement which results in a tenancy for years, at will, or from year to year. *More frequently, however, it is applied* to the writing (not usually a deed) or the parol declaration creating an estate for years, or leasehold, as it is technically called."

Pitman's Commercial Encyclopedia, vol. 3, p. 911:

"Leaseholds. Land held for a fixed term certain, as for a definite number of years, is known as a leasehold."

Schneider, California Real Estate Principles and Practices:

"Estates for years. This is the estate *quite generally* designated as a lease." (Ch. III, p. 15.)

"Regardless of the length of the term, the right of the tenant to use the leased premises is personal property, and his holding under a lease *for a definite or determinate term* is called a leasehold." (Ch. XXIII, p. 440.)

3 *Thompson on Real Property* (Perm. Ed.) 132, Section 1100:

"Definition and nature of lease . . . *'But in common parlance,* where it is said a man has a lease of property, nothing more is meant than that he has a term or estate for years in the premises . . .'"

II.

SCOPE OF REVIEW OF TRIAL COURT'S FINDINGS OF FACT.

SUMMARY: THE SCOPE OF REVIEW PRESCRIBED BY RULE 52(a), FRCP, DOES NOT CONTEMPLATE THAT DETAILED FINDINGS OF FACT SHALL BE SET ASIDE ON APPEAL AS "CLEARLY ERRONEOUS" WHEN THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD; WHEN CONFLICTING EVIDENCE OR THE CREDIBILITY OF WITNESSES IS INVOLVED; OR WHEN THE EVIDENCE, THOUGH WITHOUT MATERIAL CONFLICT, IS SUBJECT TO DIVERGENT INTERPRETATIONS.

1. Substantial supporting evidence.

Under modern equity practice[8], findings of fact will not be disturbed on appeal if supported by substantial evidence.

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[8]Advisory Committee's Note to Rule 52, FRCP:

"The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice."

Great Atl. & Pac. Tea Co. v. Grosjean, 301 US 412, 420, 57 SCt 772, 81 LEd 1193, 1198, 112 ALR 293, 297:

> "These findings [of the trial court] are assigned as error, but they have substantial support in the record and we therefore accept them."

Borden's Farm Products Co. v. Ten Eyck, 297 US 251, 261, 56 SCt 453, 80 LEd 669, 673:

> "The appellant assigns [findings of the master and the trial court] as error; but they are supported by substantial evidence and we will not disturb them."

Adamson v. Gilliland, 242 US 350, 353, 37 SCt 169, 61 LEd 356, 357-8.

And this has been the interpretation attached to Rule 52(a), FRCP, by most of the Circuits.[9]

Floridin Co. v. Attapulgus Clay Co. (CCA 3) 125 F2 669, 670:

> "This finding [of fact by the trial court] is supported by substantial evidence and is thus controlling here on appeal. (Citing Rule 52)"

2. Credibility of witnesses.

Webb v. Frisch (CCA 7) 111 F2 887, 888:

> "We do not understand that the foregoing rule [52(a)] has enlarged the discretion of this Court in passing upon the probative force of evidence. Our function is to review the finding of the lower court and not to pass upon the evidence de novo. We cannot say that a finding of the fact of prior

[9]See, cases from the several Circuits cited in the accompanying Petition.

use is 'clearly erroneous' merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of witnesses the full weight and quality of credibility which the trial court gave it."

3. Factual inferences from unconflicting evidence.

18 *Hughes Fed. Practice* 348, Section 24551:

"The rule (52) applies whether there is a conflict in the evidence *or whether there is a difference of opinion as to the inferences that may be drawn from undisputed evidence.* The Advisory Committee notes to the rule make that clear."

Holtzoff, New Fed. Procedure and the Courts, pp. 132-3:

"In view of the above mentioned restriction [of Rule 52(a)] on the scope of appellate review of the findings of a trial court, the results reached should not be set aside by the Circuit Court of Appeals in a case in which the evidence is conflicting and one of the elements involved was the credibility of witnesses. *This is likewise true, if . . . the evidence is without material conflict but subject to divergent interpretations."*

3 *Ohlinger's Fed. Practice* 658 (Rule 52, Note 2.1.4):

"Findings of fact from exhibits and conclusions from admitted facts are subject to the rule that 'findings of fact shall not be set aside unless clearly erroneous'."

The Court of Appeals has, we submit, exercised herein a scope of review over findings of fact made by the trial Court which is at variance with each of the principles stated in the foregoing paragraphs. In so doing, the Court of Appeals departed widely from accepted and usual appellate practice and from the provisions of Rule 52(a), FRCP.

The proper interpretation of the third sentence of Rule 52(a) presents an important question of federal law; and the existing doubt, resulting from conflicting decisions in the Circuits, should be removed by the Supreme Court.

Dated, San Francisco, California,
April 24, 1942.

Respectfully submitted,
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